Supreme Court, U.S.
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No. 99-214

In The

Supreme Court of the United States

JOSEPH GREENE, et al.,

Petitioners,

v.

ERIC HAM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION

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ISSUES PRESENTED

A. The cases cited by the petitioners do not evidence a division of opinion in the state and federal courts.

B. The petitioners incorrectly argue that the standard for a court's consideration of "material facts in dispute" on a motion for summary judgment based upon qualified immunity is the same as the determination of "materiality" in a *Franks* context.

C. Contrary to the assertions of the petitioners, the courts agree that questions of fact related to liability and qualified immunity in *Franks* cases are properly decided by the jury.

D. The law was well settled at the time the petitioners sought the arrest warrant for the respondent.

E. Distinguishing "exculpatory" evidence from "impeachment" evidence is inapposite to the issues presented by the petition, and as the claimed issue was not decided by the Connecticut Supreme Court, review is not warranted here.

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STATEMENT OF THE CASE

This petition seeks this Court's review of limited portions of the Opinion of the Supreme Court for the State of Connecticut entitled *Eric Ham v. Joseph Greene, et al.*, 248 Conn. 508 (1999), officially released on May 4, 1999.[1]

The petitioners ostensibly challenge the decision of the Connecticut court on two bases: first,

> whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application evidence that merely tends to impeach the credibility of witnesses is "material" and required to be disclosed in the *non*adversarial warrant application phase;

and second,

> whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application the "materiality" of information omitted from the warrant application is a legal question for the Trial Court or a factual question for the jury.

Pet. 7-8. As such, the petitioners explicitly do not seek review of the Connecticut Supreme Court's opinion insofar as it upheld the verdict in favor of the respondent on

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[1] The petitioners erroneously state that the decision was "officially published May 9, 1999." Pet. 2. Petitioners alternately state that "[t]he decision of the Connecticut Supreme Court's [sic] was officially published May 4, 1999." Pet. 5. The correct official release date of the Opinion is May 4, 1999. *Ham*, 248 Conn. at 508.

the Connecticut state tort law claims of malicious prosecution and intentional infliction of emotional distress, and the punitive damages awarded on the basis of those torts.

In support of their contentions, the petitioners allege that there exists "a division of opinion within and among the federal and State courts" on the issues presented by their petition. Pet. 7. The cases to which the petitioners cite, however, are inapposite to their argument, and as discussed more fully below, do not evidence a division of opinion on the issues stated by the petitioners. Similarly, the petitioners make numerous misrepresentations of fact and misleading statements of law, the latter at times absent any citation whatsoever in support of their legal assertions. Each of the aforementioned will be discussed in detail below, and will demonstrate that review by this Court of the instant case is not warranted.

Absent any actual division of opinion as applied to the particular circumstances of the subject case, the request of the petitioners to this Court is reduced to one of review of factual determinations made by the jury, reviewed and upheld by the trial court, and ultimately, reviewed and affirmed by the Connecticut Supreme Court.[2] Integral to an understanding of the conclusions reached is a review of the facts of the case.[3]

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[2] The detailed analysis conducted by the Connecticut court is found in *Ham*, 248 Conn. 519-526. Of the entirety of the court's reasoning, the petitioners only specifically take issue with the contextually devoid half-sentence "could not possibly have affected the magistrate's decision to issue the warrant." Pet. 18.

[3] The facts as articulated appear nearly verbatim in the Connecticut court's decision, and emanate directly from the

On January 20, 1991, a light colored station wagon containing two or three African-American males stopped in the vicinity of Sylvan Avenue and Ward and Asylum Streets in New Haven. A black male, approximately five feet five inches to five feet eight inches tall, with a dark complexion and a stocky build, stepped out of the automobile and fired approximately ten shots from a weapon into a crowd of people. He then got back into the vehicle and left the scene. There were two victims of the shooting: Markiest Alexander, age fourteen, who died as a result of the gunshot wounds; and Alfred Brown, age eighteen, who was seriously injured.

New Haven police responded to the scene. The petitioner Greene was the detective assigned to investigate the shooting and was responsible for coordinating the investigation, locating and interviewing witnesses, retrieving and examining physical evidence, preparing police reports and reviewing reports of other police department members involved in the investigation. The petitioner Sweeney was the supervisor of the investigation. Numerous witnesses identified through the petitioners' investigation were taken to police headquarters that evening and interviewed by the petitioners. They recovered, among other items, ten nine millimeter shells from the scene. Among those witnesses who gave separate tape-recorded statements to the petitioners within hours of the shooting, were Ronald Hannans, Tashim Thomas, Terry Williams and Troy Carson.

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evidence adduced at trial, as recorded in the transcript of the trial. *Ham*, 248 Conn. 510-518.

Thomas, who had stood approximately thirty feet away from the shooter, described the shooter to the petitioners as a dark skinned black male, approximately five feet eight inches tall, with a stocky build. Hannans told the petitioners that he did not recognize the shooter, whom Hannans described as a black male approximately five feet seven inches tall. Carson told the police that, moments before the shooting, he had seen a car with three black males cruising the area. He described the shooter as a dark skinned black male, approximately five feet seven inches to five feet eight inches tall with a stocky build. The male was dressed all in black. He could not identify the shooter beyond that physical description. Carson knew the respondent and told the police that he had seen him near the crime scene with a male named Timothy Davis. He stated that he saw the respondent and Davis only after the shooting had occurred and the police had arrived, as the two were leaving the area and as the crowd of onlookers was dissipating. Although Carson knew the respondent, he neither identified him as the shooter, nor suggested that the respondent was involved. Williams, who gave the same physical description of the shooter as the previous three witnesses, identified the weapon used as a "shiny nine millimeter."

On February 6, 1991, Tremaine Ortiz, another witness to the shooting, also described the shooter as a dark skinned black male, approximately five feet five inches tall with a medium build. Ortiz verified that the shooter had a uniquely shiny handgun and that a person named "Joe," who fit the description, was known for robbing drug dealers in the area where the shooting occurred.

Shortly after the evening of the shooting, the petitioners interviewed Brown, the surviving victim. He told the police that his assailant was a black male, approximately five feet nine inches tall. Brown, who knew the respondent from school and the neighborhood, told the petitioners that he did not recognize his assailant and, in fact, had never seen him before.

Nearly three weeks after the shooting, on February 6, 1991, the petitioners interviewed Lynwood Cypress. Cypress described the shooter as a dark skinned black male, five feet five to five feet seven inches tall, with a stocky build. He confirmed Williams' description of the weapon. Additionally, he advised the petitioners that the shooter was the same person who had tried to rob him at gunpoint earlier that evening, shoving the same firearm into his stomach. Cypress was then transported to the police department where he gave a tape recorded statement in which he repeated his earlier description of the shooter. Cypress believed that the shooter's name was Joe, but did not know the man's full identity. Finally, Cypress told the petitioners that he had seen the same person two days after the shooting, but had not seen him in a while and therefore assumed that he was not from New Haven.

In contradiction to his earlier statements, on February 11, 1991, in his third statement to the petitioners, Cypress stated that he personally knew the respondent and that the respondent was the shooter. He witnessed the respondent get out of a station wagon and open fire into a crowd of people on Sylvan Avenue. According to Cypress, the respondent was dressed in black pants, a black jacket, black shoes and a black hat and was carrying

a nickel plated nine millimeter gun that he used to shoot the victims. The respondent thereafter got back into the car, which sped away. The vehicle was driven by someone named Joe, whom Cypress also recognized. He did not know the person in the back seat. The respondent and Joe returned moments later and stood in the crowd of onlookers for three to four minutes. According to this statement by Cypress, he and Carson stood close to the respondent and Joe, and Carson conversed with them.[4]

Joseph Timothy Davis also gave a statement to the police in which he incriminated the respondent. He described how, on the day of the shooting, he and the respondent had been driving around in a station wagon that he had rented from someone in the neighborhood. According to Davis, they had stopped at the corner of Sylvan and Asylum Streets to talk with some friends, when the respondent began playing with a nine millimeter gun he was carrying. The respondent leaned over Davis, and while he was tapping the weapon on the windowsill of the car, the gun discharged, and bullets ricocheted off the ground, striking two boys whom Davis knew from the neighborhood. Thereafter, they left the scene. In contradiction to every other witness as to the location of the shooter, in that statement, Davis reiterated that the respondent was seated in the car when the gun was fired. Following police questioning, Davis changed

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[4] Despite extensive cross examination of the petitioners at trial on this issue, the jury's verdict, the trial court's written findings and the Connecticut Supreme Court's discussion of the matter, the petitioners assert that "the fact that [Lynwood Cypress] gave the incriminating statement was not challenged." Pet. 5.

his story regarding the respondent's location, this time placing the respondent outside the vehicle during the shooting.

At trial, Davis described how he had been taken to the New Haven police station where Greene intimidated and threatened him with prosecution. Davis related how Greene had told him falsely that the respondent had incriminated him in the shooting. Davis further testified that Greene, in effect, had told him what to say in his tape-recorded statement. Davis testified that in order to ensure his release, Davis had fabricated a story incriminating the respondent, which was included in the warrant affidavit. Davis further explained to the jury that on February 18, 1991, he recanted his statement incriminating the respondent. There was also evidence that the petitioners were aware of the recantation.

On January 28, 1991, the petitioners learned from two inmates, one of whom was a relative of one of the victims, that an individual identified as Joe Covington, who was incarcerated at the New Haven Community Correctional Facility, was claiming responsibility for the shooting of Brown and Alexander. He had boasted to at least five people that he was responsible for the January 20, 1991 shooting. He provided details of the crime and how it had occurred. The petitioners sent another policeman to interview two other inmates, George Galberth and Michael Gaetano, but they never interviewed Covington in connection with their investigation. Nor did they assign any other member of the police department to interview him or to show Covington's photograph to any of the witnesses.

On February 11, 1991, the petitioners were given information that an individual named Tyrese White had shot Alexander and Brown. On the same date, the petitioners received information from another source that an individual nicknamed "Ears" had had a dispute with Alexander two weeks before the shooting, and had threatened him at that time with a firearm. Neither lead was investigated. The petitioners did, however, reinterview Carson that day. He repeated much of what he had already stated to the police on the evening of the shooting. He reiterated that he could not identify the shooter beyond the physical description he had already provided, and that he had seen the respondent and Davis leaving the area of the shooting as the crowd of onlookers dissipated, only after the shooting had occurred and the police had arrived.

On February 12, 1991, Greene executed a search warrant at the respondent's household. The respondent, an eighteen year old black youth, six feet two inches tall, light skinned, and of slim build, weighing 155 pounds, was present at the time of the search. He had extensive contact with Greene, thereby allowing Greene carefully to observe the respondent and take note of his physical appearance.

On February 13, 1991, the petitioners prepared and submitted an affidavit in support of a request for an arrest warrant for the respondent, charging him with murder in the first degree, assault in the first degree and two counts of criminal use of a firearm. Although it did not identify Cypress as the author, the affidavit prepared by the petitioners included information obviously taken from Cypress' third statement, the one in which he

incriminated the respondent. Their affidavit also included the contents of the statement by Davis that he had been with the respondent when the respondent shot the victims. The warrant did not, however, include that portion of Davis' earlier statement placing the respondent inside the vehicle when the weapon discharged.

Additionally, the warrant did not include the fact that Thomas, Carson, Hannans, Williams and Ortiz, neutral eyewitnesses to the shooting, had told police that the shooter was five feet seven inches or five feet eight inches in height, with a dark complexion and a stocky build. Nor did the affidavit refer to Brown's statement. Although the warrant referred extensively to Cypress' incriminating statement, it failed to even mention the fact that he had given two previous statements, neither of which included an identification of the respondent as the shooter. Nor, therefore, did it include a reference to the fact that Cypress had first described the shooter as being a dark skinned black male, five feet five or six inches in height with a stocky build, or the fact that the shooter, known to him only as Joe, had tried to rob Cypress earlier on the day of the shooting. Further omitted from the affidavit was Cypress' statement that, although he had seen Joe two days after the shooting, he had not seen him for a long time and therefore assumed he was not from the area. Finally, the warrant also failed to mention Covington. Indeed, it did not include any reference to the two prison inmates who had reported to the police that Covington had boasted about being the shooter while providing details about the incident and its victims.

Based upon the affidavit prepared by the petitioners, a warrant for the respondent's arrest was issued on

February 13, 1991. The warrant was executed by the petitioners that day, and the respondent was arrested and held in custody until May, 1991. On May 9, 1991, the criminal prosecution was nolle prosequied by the state because the two witnesses, Cypress and Davis, recanted their earlier statements implicating the respondent. The charges thereafter were dismissed by operation of law.

In August, 1991, the respondent brought a complaint against the petitioners, charging them each with federal civil rights claims pursuant to *42 U.S.C. §§ 1983* and *1988* for false arrest and malicious prosecution and with common-law claims of malicious prosecution and the intentional infliction of emotional distress.

The case was tried to the jury, which returned a verdict in favor of the respondent as to both petitioners. The verdict forms reflect the following awards against each of the two petitioners: $100,000 compensatory damages for each of the two federal civil rights claims and $100,000 compensatory damages for each of the two common-law claims. Additionally, as indicated on the verdict forms, the jury awarded the respondent $200,000 in punitive damages against each of the two petitioners for each of the two civil rights claims. The jury had been instructed by the trial court that there would be one award for compensatory damages and that its verdict form should reflect the total amount it considered appropriate. In the absence of any evidence indicating that separate types of compensatory damages should have been awarded based upon the different theories of liability, the trial court approved the total award of $100,000 for compensatory damages. Turning to the issue of punitive damages, the trial court approved the total award of

$800,000 in punitive damages in connection with those claims.[5]

The petitioners thereafter filed a single motion requesting that the trial court arrest judgment, set aside the verdict, enter judgment notwithstanding the verdict or alternately, grant a new trial. The respondent subsequently filed his motion in objection thereto. The trial court heard oral argument on the petitioners' post trial motions no fewer than four times.

On May 7, 1997, the trial court issued a written memorandum of decision on the petitioners' motion. In its twenty-seven page decision, the trial court upheld the jury's verdict and awards. Pet. 1A-31A.

The petitioners thereafter appealed to the Connecticut Supreme Court. On May 4, 1999 the court issued its Opinion affirming the jury's verdict and the trial court's refusal to set aside that verdict. *Ham v. Greene*, 248 Conn. 508 (1999).

This petition followed.

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[5] Contrary to the assertions of the petitioners, damages in the instant case were never "reduced on posttrial motion" or remitted in any way. Pet. 4. To the contrary, the trial court increased the amount of the award subsequent to the jury's determination of punitive damages on the state law claims. *Ham*, 248 Conn. at 518-519. This award was affirmed by the Connecticut court, and is not here challenged. *Id.*, 534-537.

REASONS FOR DENYING THE WRIT

A. The cases cited by the petitioners do not evidence a division of opinion in the state and federal courts.

The Petitioners claim that four federal cases exist which, they purport, "support their petition," and assumedly, are at odds with the state and federal cases cited by the court in *Ham v. Greene*. Pet. 7 n.1.

A careful examination of *all* of the cases cited by the petitioners, however, reveals an absence of the claimed conflict. Each of the cases are inapposite to the issues presented by the instant petition. Three of the four cases offered by the petitioner – *Smith, Hervey* and *Branch* – consider the issue of qualified immunity in a *Franks* case **on pretrial motion**.[6] The fourth, *Stigall*, addresses the entry of judgment in favor of the defendants after trial – the plaintiff having survived a motion for summary judgment – pursuant to their motion for judgment as a matter of law.[7] None of the cases cited by the petitioners stand

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[6] *Smith v. Reddy*, 101 F.3d 351 (4th Cir. 1996) (qualified immunity at the summary judgment stage); *Hervey, et al. v. Estes, et al.*, 65 F.3d 784 (9th Cir. 1995) (qualified immunity at the summary judgment stage); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (qualified immunity upon motion to dismiss).

[7] *Stigall v. Madden, et al.*, 26 F.3d 867 (8th Cir. 1994). It is fascinating that the petitioners include this case among those that they assert support their petition. The term "qualified immunity" is nowhere used in the court's opinion. In reaching its conclusion, the court applies the directed verdict standard, and in dicta, obliquely refers to the objective reasonableness of the officer:

> We do not believe that this is evidence from which a factfinder could have found for the plaintiff. The

for the proposition that issues of fact should be taken from the jury in the wholesale fashion that the petitioners claim. *Smith, Hervey, Branch, Stigall, supra.*

On the basis of three of the cited cases,[8] the petitioners assert that a division exists in the law whether the issue of materiality[9] in the context of civil rights cases

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> question in a case like this is 'whether a reasonably well-trained officer in [this officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.'
>
> *Id.* at 869.

The court evidently considered facts found by the jury and ruled upon them as a matter of law, but what those facts were is a matter of sheer speculation. The court merely conclusorily states that "[t]he information on which Mr. Burrow acted was not inherently unreliable, nor was it obviously less credible than the evidence opposed to it. There was, therefore, nothing objectively unreasonable about believing it." *Id.* The probative value of this case to the petitioners is nil – it stands for none of the propositions for which it may conceivably be offered. If, however, it may be construed to stand for the permissibility of a trial court allowing disputed issues of fact to survive a motion for summary judgment and be submitted to the jury, and thereafter to review the findings of the jury against the template of objective reasonableness (e.g., qualified immunity), then it in fact supports the procedure undertaken by the trial and reviewing courts in *Ham, supra.*

[8] *Smith v. Reddy*, 101 F.3d 351 (4th Cir. 1996); *Hervey, et al. v. Estes, et al.*, 65 F.3d 784 (9th Cir. 1995); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991).

[9] The petitioners expand their argument as the petition progresses to encompass numerous factual questions, including: what material was omitted from or included in the warrant affidavit; its truth or falsity; the weight a reviewing magistrate would give such information; the "compelling"

pursuant to *Franks v. Delaware*[10] is a question of law for pretrial determination by the court, or a question of fact properly left to the jury at trial. The petitioners further argue that the Connecticut Supreme Court erred in upholding the latter procedure in *Ham v. Green, supra.* Pet. 8. The petitioners, however, have chosen to ignore the obvious – in each of the cases cited by them the defendants therein submitted to the trial court **dispositive pretrial motions based upon qualified immunity**. *See generally, Smith,* 101 F.3d 351; *Hervey,* 65 F.3d 784; *Branch,* 937 F.2d 1382. None of the cases cited hold that the questions of fact identified by the petitioner are considered by the court for any but the limited purpose of the determination of the pretrial motion. In the instant case, however, the petitioners did not file any pretrial motions whatsoever. Further, the petitioners raised no objection at trial to the correct presentation of the factual issues to the jury, and in fact, the petitioners agreed to the charge of

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nature of such information; whether omitted information "negate[d] guilt;" whether such information would have led to the decision "to not prosecute;" whether the actions of the officer constituted "error"or were knowing or reckless (subjective intent); whether the actions of the officer were reasonable; whether or not probable cause existed; and whether or not the actions of the officer were objectively reasonable. See, e.g., Pet. 10, 21.

The shotgun approach of the petitioners attacks, without distinction, both the submission of factual issues to the jury necessary to the determination of liability in a *Franks* claim, and the submission of factual issues necessary to the determination of the qualified immunity issue. *Id.*

[10] *Franks v. Delaware,* 438 U.S. 154 (1978).

law given and the procedure followed by the trial court. *Ham*, 248 Conn. at 527, 529 n.12.[11]

The petitioners nevertheless attempt to twist the well-settled law which a trial court must follow in considering a pretrial dispositive motion based upon qualified immunity in a *Franks* civil case into a rule absolutely barring submission to the jury the factual issues of materiality, reasonableness and probable cause. The petitioners state, utterly without support in, or even citation to law:

> In the civil case, only a trained and experienced judge can reasonably evaluate what omitted evidence another trained and experienced judge might have found so compelling as to

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[11] The Connecticut Supreme Court correctly observed that "the defendants' complaint . . . that the trial court's instruction on materiality was deficient" was "raised for the first time on this appeal." *Ham, supra*, at 527. The court further held:

> The defendants claim that the court failed to give proper guidance regarding the meaning of exculpatory information and materiality. The claim was not raised properly at trial. The defendants expressly informed the court, following its charge to the jury, that they had no objections to the charge. As we have repeatedly stated, issues not properly raised before the trial court will ordinarily not be considered on appeal.

Ham, at 529 n.12.

The Connecticut court expressly did not review, and certainly did not decide upon the trial court's instructions of law regarding the meaning of exculpatory information and materiality. As such, the Court should deny the petition insofar as it requests review of the trial court's submission to the jury on these matters.

> negate guilt and thus lead to the decision to not prosecute, and alternately, what error in the warrant application is nevertheless sufficiently reasonable so as to entitle the accused officer to qualified immunity even if probable cause is found to be lacking after "correction" of the warrant for false or omitted evidence.

Pet. 10.

The petitioners here intentionally blur the distinction between the trial court's determination whether there exists a dispute of material fact to be submitted to the jury, and the jury's determination of facts relevant to liability in the underlying tort. Such faulty reasoning leads to clearly untenable results – if the argument of the petitioners were to be credited, then the determination of whether a *Franks* violation has occurred would *never* be one for the jury, whether or not defendants offer the defense of qualified immunity. If this is not the necessary conclusion that one must draw from the petitioners' argument, how then can their assertion that the *Ham* court erred in submitting factual issues to the jury be explained? The only possible answer is that the petitioners disagree with the **fact-bound** conclusions of the trial court and the *Ham* court based upon the facts found by the jury; first, that the facts found support a finding against the petitioners; and second, that qualified immunity was unavailable to them. *Ham, supra,* at 527.

B. The petitioners incorrectly argue that the standard for a court's consideration of "material facts in dispute" on a motion for summary judgment based upon qualified immunity is the same as the determination of "materiality" in a *Franks* context.

Summary judgment based upon qualified immunity "should be granted only when it is appropriate, that is, when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Smith v. Reddy*, 101 F.3d 351, 357 (4th Cir. 1996). Properly raised on a motion for summary judgment, **if a defendant so elects**, the defense of qualified immunity is a well-settled doctrine that protects government officials from civil suits arising from the performance of their discretionary functions when that performance "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 818-19).

The petitioners do not dispute that the right to be free from arrest absent probable cause was clearly established, nor do they contest that the right was one which a reasonable person would have known at the time of their

submission of the affidavit in support of the arrest warrant for the respondent;[12] therefore, the appropriate inquiry is one into the objective reasonableness of the actions of the respondents. *Harlow,* 457 U.S. at 818-19; *Anderson,* 483 U.S. at 639. In order to be entitled to summary judgment on such a defense, the officer must adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiff, could conclude that it was objectively unreasonable for the officer to believe that probable cause did not exist. *Ham,* 248 Conn. at 522, quoting *Golino v. New Haven,* 950 F.2d 864, 870 (2nd Cir. 1991), *cert. denied,* 505 U.S. 1221 (1992), citing *Malley v. Briggs,* 475 U.S. 335, 341 (1986); *Robison v. Via,* 821 F.2d 913, 921 (2nd Cir. 1987); *Mulligan v. Rioux,* 229 Conn. 716, 729 (1994).

When considering a motion for summary judgment based upon qualified immunity, it is appropriate for the reviewing court to determine whether there exist genuine disputes of material facts. In this context, only if "the corrected affidavit did not support an objective finding of probable cause would the factual disputes be material to resolving the issue of probable cause." *Cartier v. Lussier,* 955 F.2d 841, 845 (2nd Cir. 1992). If the court determines that no dispute of material facts exist, then the court may properly grant summary judgment, in effect taking all factual determinations from the jury.

The petitioners rely on the holdings of a scant few cases, wherein summary judgment was granted, and

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[12] See Section D, *infra.*

issues of fact were in effect taken from the jury for the sole purpose of determining the motion, to extrapolate that in all circumstances the issues of materiality, reasonableness and probable cause in a *Franks* analysis, rather than in a summary judgment/qualified immunity analysis in a *Franks* case, are questions of law for the court. The cases cited by the petitioner clearly do not stand for this proposition.[13] In fact, nowhere in the law is

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[13] It is extremely telling that the petitioners quote extensively from the district court's decision in *Smith v. Reddy*, 882 F. Supp. 497 (D. Md. 1995). Pet. 23-24. Although the district court's decision in *Smith*, 882 F. Supp. at 499-500, was upheld on review, the circuit court took great pains to articulate that "we find that Reddy's conduct was objectively reasonable and affirm the summary judgment that granted her immunity. However, we reach that conclusion by an analysis that differs somewhat from the district court's." *Smith v. Reddy*, 101 F.3d 351, 353, 355 (4th Cir. 1996). The court stated:

> The district court held that if a plaintiff alleges that an officer obtained a warrant by misleading a magistrate, the plaintiff must satisfy the subjective standard set forth in *Franks* . . . to overcome a defendant's claim of qualified immunity . . . [which] requires 'a substantial preliminary showing that a [material] false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit' . . . Rather than engaging the *Franks* test, we apply the qualified immunity analysis, which examines the objective reasonableness of an officer's conduct.

Smith v. Reddy, 101 F.3d at 355.

The quoted portion of the district court's opinion offered by the petitioners is excerpted directly from that portion of the court's holding which was expressly determined to be incorrect reasoning by the circuit court. *Smith v. Reddy*, 101 F.3d at 355; *Smith*, 882 F. Supp. at 499-500. The corrected reasoning strongly

there to be found any support for the petitioners' assertion.

Well-settled law instructs that the purpose of qualified immunity is, in effect, to give official transgressors a "second bite at the apple," by allowing for the determination that their actions, although mistaken, were reasonable. To this end, the doctrine of qualified immunity is appropriately considered by the court either before trial, if raised in a pretrial dispositive motion, or after a finding of liability at trial.

In the instant case, the petitioners did not move for summary judgment or to dismiss the respondent's claims prior to trial. The petitioners' claims, therefore, that the trial court submitted the case to the jury in error is without foundation in law or reason. The trial court did, after trial, pursuant to the written motion of the petitioners filed after the trial, consider and reject the defense of qualified immunity. In so doing, the court independently evaluated the materiality of the **facts omitted from the warrant affidavit** (as opposed to the summary judgment question whether material facts were in dispute), and determined that no reasonable police officer could have mistakenly believed that probable cause existed in the corrected affidavit. The standard applied by the trial court, and the de novo review standard applied by the Connecticut court were correct and in accord with well-settled law.

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suggests that the elements of a *Franks* civil claim are properly questions of fact for the jury. *Id.*, at 355.

As such, the cases cited by the petitioners cannot be construed to support the petitioners' assertion that the issues of materiality, reasonableness and probable cause should always be determined by the court in *Franks* civil cases. It is solely with the factual conclusion of the lower courts that the petitioners take issue. Therefore, this Court should decline review of the instant petition.

C. Contrary to the assertions of the petitioners, the courts agree that questions of fact related to liability and qualified immunity in *Franks* cases are properly decided by the jury.

Factual determinations necessary to the determination of qualified immunity are properly submitted to the jury. *Magnotti v. Kuntz,* 918 F.2d 364, 367 (2nd Cir. 1990); *P.C. v. McLaughlin,* 913 F.2d 1033, 1039 (2nd Cir. 1990); *Dube v. State University of New York,* 900 F.2d 587, 595-596 (2nd Cir. 1990), *cert. denied,* 501 U.S. 1211 (1991).

Summary judgment is inappropriate in "doubtful cases" where the court is unsure what weight a neutral magistrate would give the remaining truthful information. *Velardi v. Walsh,* 40 F.3d 569, 573-74 (2nd Cir. 1994). "[R]eview of the "corrected affidavit" . . . where officers procuring a warrant have deliberately misled the magistrate about relevant information [,] . . . [to] . . . try to predict whether a magistrate would have found probable cause if he had been presented with truthful information . . . is a question of fact rather than of law." *Velardi,* 40 F.3d at 574 n.1.

In a § 1983 *Franks* action the issue of whether there was probable cause to make an arrest is a question for the

jury. *Sharrar v. Felsing*, 128 F.3d 810, 817-18 (3rd Cir. 1997); *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3rd Cir. 1984). The question is for the jury if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest. *Sharrar*, 128 F.3d at 818; *Deary*, 746 F.2d at 192; *Luthe v. The City of Cape May*, 49 F. Supp. 2d 380, (D. N.J. 1999). The objective reasonableness of the officer's actions is an issue for the jury when facts material to the issue are in dispute. *Luthe*, 49 F. Supp. 2d at 389; *Sharrar*, 128 F.3d at 828; *Wilson v. Layne*, 119 S.Ct. 1692, 1696 (1999).

In determining qualified immunity, the jury properly decides all the fact questions, including whether probable cause for an arrest exists and whether the officer acted objectively reasonably. *Hindman v. City of Paris, Texas*, 746 F.2d 1063, 1068 (5th Cir. 1984). It is error for a court to instruct that probable cause for a warrant is absent, and that it does not find the officers credible, and such error is "only a manifestation of the more basic difficulty of not submitting to the jury the factual disputes regarding the warrant." *Hindman*, 746 F.2d at 1067-68.

If the facts are sufficiently disputed to avoid a directed verdict on the issue of an officer's alleged deception, the jury properly resolves issues prior to the court ruling on the affidavit's validity. *Id.*, at 1067-1068.

"[W]here facts relied upon to show probable cause in a § 1983 action [for false arrest] are controverted, they must be resolved by the jury before controlling legal principles are applied." *Garris v. Rowland*, 678 F.2d 1264,

1270 (5th Cir.), *cert. denied*, 459 U.S. 864 (1982); see also *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982).

The "question whether the judicial officer issuing the warrant would have done so even without the knowingly or recklessly false statement is one for the jury." *Hill v. McIntyre*, 884 F.2d 271, 275-76 (6th Cir. 1989).

Whether the judicial officer issuing a warrant would have done so even without the knowingly or recklessly false statements included in the warrant affidavit is a question for the jury. *Yancey v. Carroll County*, 876 F.2d 1238 (6th Cir 1989).

The nature of a defendant's conduct, the defendant's state of mind and intent are issues of fact for a jury. *Burke v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991).

Whether an officer deliberately or recklessly included false statements in the affidavit is a factual determination for the jury at trial. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995).

Whether, despite the authorization of a magistrate, a reasonably well-trained officer could have believed that probable cause for arrest existed is a factual issue for the jury. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991); *Haywood v. Nye*, 999 F. Supp. 1451 (D. Utah 1998).

The claims contained in the plaintiff's complaint and the credibility of the parties, when in dispute, are questions of fact for the jury. *Haywood*, 999 F. Supp. at 1451 n.1.

Whether an officer knew at the time a warrant was executed that the warrant was unreliable and that statements contained in the affidavit were uncorroborated "raise[s] a triable issue" of fact for the jury. *Haywood*, 999 F. Supp. at 1461.

Whether, despite the authorization of a magistrate, a reasonably well-trained officer could have believed that probable cause for arrest existed is a factual issue for the jury. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991); *Haywood*, 999 F. Supp. at 1461.

The extent of an officer's knowledge about the problems with the investigation is a question of fact for the jury. *Id.* Factual disputes of this nature preclude the court from ruling as a matter of law that the officer's reliance on the arrest warrant was objectively reasonable, requiring denial of summary judgment based upon qualified immunity, and submission to the jury for factual determination. *Id.*

Whether an officer presented evidence of probable cause to the magistrate is a question of fact for the jury. *Kelly v. Curtis*, 21 F.3d 1544, 1555 n.8 (11th Cir. 1994).

D. The law was well settled at the time the petitioners sought the arrest warrant for the respondent.

The petitioners allege that the Connecticut court was incorrect in its statement of the materiality of the information omitted from the warrant affidavit by the petitioners. Pet. 17-20. Specifically, the petitioners take issue with the court's holding that various matters not included in the affidavit " 'were material because they

were facts which 'would likely be given weight by a person considering the question' of probable cause.' "[14] The petitioners assert that this well-settled rule of law "simply does not exist, and . . . certainly was not 'clearly established' " at the time that the petitioners submitted their affidavit in support of the arrest of the respondent, on February 13, 1991. Pet. 18-19.

A review of the disputed phrase, in its original context, is enlightening:

> Whether an item of information is material or not is, in the context of a motion for summary judgment, a mixed question of law and fact. See, e.g., ***TSC Industries, Inc. v. Northway, Inc.***, 426 U.S. 438, 450, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 **(1976)**. The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 **(1986)**. The factual component requires an inference as to whether the information would likely be given weight by a person considering that question. ***TSC Industries, Inc. v. Northway, Inc.***, 426 U.S. at 450, 96 S.Ct. at 2132.

Golino, 950 F.2d at 871 (emphasis supplied).

As is plainly evident, the argument advanced by the petitioners that the standard endorsed by the court was

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[14] The Connecticut court was here quoting the decision of the trial court, which, in turn was quoting *Golino v. City of New Haven*, 950 F.2d 864, 871 (2nd Cir. 1991), *cert. denied sub nom. Lillis, et al. v. Golino*, 505 U.S. 1221 (1992). Pet. 6A.

not "anywhere in effect at the time the warrant application for Mr. Ham was submitted" is groundless. Pet. 18.

Similarly, the law, for the purposes of the qualified immunity question, was clearly established. As the Connecticut Supreme Court observed, "the right of an individual not to be subjected to arrest without probable cause has long been clearly established," *Ham*, 248 Conn. at 523,[15] and, dispositively, "**was not disputed by the parties**." *Id.* (emphasis supplied). The existence of the right was not disputed at trial or on appeal; likewise, the right to be free from arrest absent probable cause is not seriously disputed here.

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[15] See, e.g., *Franks v. Delaware*, 438 U.S. 154, (1978); *United States v. Leon*, 468 U.S. 897 (1984); *Malley v. Briggs*, 475 U.S. 335 (1986).

That the right was clearly established is all the more evident as refined and articulated by one court:

> A more particularized formulation of the right at issue is the right to be free from an arrest based on a warrant that would not have been issued if the officer seeking the warrant had disclosed to the issuing magistrate information within the officer's knowledge that negated probable cause. See *Cartier v. Lussier*, 955 F.2d 841, 845-46 (2nd Cir. 1992); *Golino v. New Haven*, 950 F.2d 864 (2nd Cir. 1991), *cert. denied*, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992); *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2nd Cir. 1990).

Brown v. D'Amico, 35 F.3d 97, 99 (2nd Cir. 1994).

E. Distinguishing "exculpatory" evidence from "impeachment" evidence is inapposite to the issues presented by the petition, and as the claimed issue was not decided by the Connecticut Supreme Court, review is not warranted here.

The petitioners urge a distinction upon this Court between so-called "exculpatory" and "impeachment" evidence. Pet. 14. This issue, raised before the trial court on post verdict motion by the petitioners, was rejected by that court. Pet. 7A. The issue was not raised before the Connecticut Supreme Court, and as such, should not now be reviewed by this Court.[16] *See generally, Ham,* 248 Conn. 508.

The resuscitation of this argument by the petitioners is significant in a number of respects. All of the state and federal cases cited by the petitioners in support of this argument are imported from the criminal context. Pet. 14-17, 14 n.7, n.8, 15 n.9, 16 n.10.[17] As the petitioners

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[16] See footnote 11, *supra.*

[17] The inapplicability of the cited cases is even more marked in the context of the Connecticut state cases which deal with the prosecutorial obligation in the grand jury context. See, e.g., *State v. Couture,* 194 Conn. 530 (1984). In Connecticut, the role of the state grand jury is statutorily limited to investigation, rather than indictment. C.G.S. §§ 54-45 *et seq.*

As the Second Circuit has observed:

> Under Connecticut law, the finding of probable cause by an investigatory grand jury does not seem to establish conclusively that probable cause exists for the arrest: "Investigating grand juries neither **try** nor **condemn** nor **accuse**; they only **inquire** and **report**." *In re Investigation of the Grand Juror into the Bethel*

themselves admit, each of the cases cited articulate only the burden of disclosure to a criminal defendant placed upon the prosecuting authority in the limited contexts of those proceedings. *Id.* The petitioners nevertheless attempt to import, without precedent, the standard for disclosure of information to a criminal defendant by the prosecuting authority at the grand jury and criminal trial phases into the context of the constitutional obligation of an officer submitting a probable cause affidavit. The absence of caselaw in support of this assertion within the *Franks* civil context is strong indication that the argument of the petitioners has no support within that context.

Contrary to the assertions of the petitioners, the court has clearly defined material information in the *Franks* context as "information [which] would likely be given weight by a person considering that question." *TSC Industries,* 426 U.S. at 450. "The weight that a neutral magistrate would likely have given the . . . information [omitted from the warrant affidavit], along with the other information that was concealed or misrepresented, is not a legal question but rather is a question to be resolved by the finder of fact." *Golino, supra,* at 872; *TSC Industries,* 426 U.S. 438. Similarly, whether a magistrate would have found probable cause if [s]he had been presented with truthful information . . . is a question of fact rather than of law. *Velardi v. Walsh,* 40 F.3d 569, 574 n.1 (1994). The holding applied by the Connecticut court in the instant case based upon clearly established law in effect at the

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Police Department, 188 Conn. 601, 605 (1982) (emphasis in original).

Brown v. D'Amico, 35 F.3d 97, 99 (1994).

time the petitioners submitted their affidavit places no "greater burden of disclosure upon law enforcement" as the petitioners claim. Pet. 19. The petitioners had, and law enforcement officers continue to have a constitutional duty to disclose that "readily available exculpatory evidence of which [the officer] had been made aware." *Smith v. Reddy, supra,* at 357; *Torchinsky v. Siwinski,* 942 F.2d 257, 264 (4th Cir. 1991).

As such, this claim by the petitioners does not merit review by this Court.

CONCLUSION

For the reasons articulated above, this Honorable Court should deny the petition in the instant case.

Respectfully submitted,

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